

1 **WO**

2
3
4
5
6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
8

9 Twin City Fire Insurance Company,

No. CV-22-00489-TUC-JGZ

10 Plaintiff,

**Order Re: Motion for Summary
Judgment**

11 v.

12 DanceIt! Studio LLC, et al.,

13 Defendants.

14 Pending before the Court is Plaintiff Twin City Fire Insurance Company's Motion
15 for Summary Judgment in this declaratory action. (Doc. 29.) The Defendants, Alberto and
16 Gabriela Valencia and DanceIt! Studio, LLC (collectively, "DanceIt!") and Andrea and
17 Javier Perez, oppose the motion. Twin City seeks judgment declaring that: (1) it has no
18 duty to defend Alberto and Gabriela Valencia, or DanceIt!, in a lawsuit brought in state
19 court by Andrea and Javier Perez; and (2) the Valencias and DanceIt! are not entitled to
20 indemnity from Twin City for any settlement or judgment in the lawsuit. (Doc. 1 at 6–7.)
21 For the following reasons, the Court will grant summary judgment in favor of Twin City.

22 **I. Introduction**

23 Alberto and Gabriela Valencia own and operate a fitness studio called DanceIt! in
24 Tucson, Arizona. The studio offers dance fitness classes, including kickboxing, Zumba,
25 yoga, and step aerobics. In December 2019, Andrea Perez participated in a kickboxing
26 class at the studio and suffered injuries to her wrists while using a trampoline during the
27 class. In 2021, Andrea and Javier Perez filed a lawsuit in state court against DanceIt! and
28 the Valencias, alleging negligence ("State Court Action").

1 Twin City Fire Insurance Company (“Twin City”), which is not a party to the State
 2 Court Action, provided business liability insurance to the Valencias. Twin City filed this
 3 declaratory relief action seeking a determination that its policy does not require it to defend
 4 or indemnify the Valencias or DanceIt! in the State Court Action. (Doc. 1; Doc. 23.) In
 5 opposition to Twin City’s motion for summary judgment, DanceIt! and the Perezes argue
 6 that the reasonable expectations doctrine precludes enforcement of the exclusions from
 7 coverage contained in the Twin City Policy. Defendants bear the burden of proving the
 8 applicability of the reasonable expectations doctrine at trial. *P.F. Chang’s China Bistro,*
 9 *Inc. v. Fed. Ins. Co.*, CV-15-01322-PHX-SMM, 2016 WL 3055111, at *4 (D. Ariz. May
 10 31, 2016) (citing *State Farm Fire & Cas. In. Co. v. Grabowski*, 150 P.3d 275, 277 (Ariz.
 11 App. 2007)).¹

12 **II. Summary Judgment Standard**

13 A court must grant summary judgment “if the movant shows that there is no genuine
 14 dispute as to any material fact and the movant is entitled to judgment as a matter of law.”
 15 Fed. R. Civ. P. 56(c); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 322–23 (1986). The
 16 movant bears the initial responsibility of presenting the basis for its motion and identifying
 17 those portions of the record, together with affidavits, if any, that it believes demonstrate
 18 the absence of a genuine issue of material fact. *Id.* at 323. A genuine dispute exists if “the
 19 evidence is such that a reasonable jury could return a verdict for the nonmoving party,”
 20 and material facts are those “that might affect the outcome of the suit under the governing
 21 law.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

22 A movant is entitled to judgment as a matter of law against a party who fails to make
 23 a showing sufficient to establish the existence of an element essential to that party’s case,
 24 and on which that party will bear the burden of proof at trial. *Celotex*, 477 U.S. at 322. In
 25 *Celotex*, the Supreme Court explained: “In such a situation, there can be ‘no genuine issue
 26 as to any material fact,’ since a complete failure of proof concerning an essential element
 27

28 ¹Because the Perezes stand in the shoes of DanceIt! for purposes of challenging the
 applicability of the insurance policy, the Perezes also bear the burden of proof.

1 of the nonmoving party's case necessarily renders all other facts immaterial. The moving
 2 party is 'entitled to a judgment as a matter of law' because the nonmoving party has failed
 3 to make a sufficient showing on an essential element of her case with respect to which she
 4 has the burden of proof." *Id.* at 322–23.

5 At summary judgment, the judge's function is not to weigh the evidence and
 6 determine the truth but to determine whether there is a genuine issue for trial. *Id.* In its
 7 analysis, the court must believe the nonmovant's evidence and draw all inferences in the
 8 nonmovant's favor. *Id.* at 255. In reviewing the evidence, the court need only consider
 9 the cited materials, but it may consider any other materials in the record. Fed. R. Civ. P.
 10 56(c)(3).

11 **III. Undisputed Facts²**

12 In 2018, Twin City issued an insurance policy to "Alberto & Gabriela Valencia"
 13 effective November 2, 2018 through November 2, 2019. (PSOF ¶ 11, Exh. 3.)

14 In 2019, Twin City issued a renewal policy to "Alberto & Gabriela Valencia,"
 15 effective November 2, 2019 through November 2, 2020 (the "Policy" or "Renewal
 16 Policy"). (PSOF ¶ 10, Exh. 2.) The Renewal Policy was in effect at the time of Andrea
 17 Perez's injury. The first policy for 2018–19 and the Renewal Policy for 2019–20 contained
 18 the same three exclusions at issue in this case. (*Compare* Exh. 2 at 14, 55, 52, 104, 106
 19 *with* Exh. 3 at 9, 58, 99, 101.)

20 One exclusion, entitled "Exclusion – Trampoline and Gymnastic Rebounding
 21 Devices," states: "This insurance does not apply to 'bodily injury' arising out of the: (a)
 22 ownership, (b) maintenance, (c) operation, or (d) use of any trampoline or gymnastic
 23 rebounding device." (Doc. 30-2 at 105 ("Trampoline Exclusion").)

24 A second exclusion, which is only applicable to Medical Expenses coverage, reads:
 25 "We will not pay expenses for 'bodily injury'" to "a person injured while practicing,
 26 instructing or participating in any physical exercises or games, sports or athletic contests."

27 ²The facts are taken from Twin City's Statement of Facts ("PSOF") (Doc. 30). The
 28 DanceIt! Defendants and Perez Defendants do not dispute these facts. (Doc. 38; Doc. 40.)

(Doc. 30-2 at 63 (“Bodily-Injury Exclusion”).)

A third exclusion, entitled “Exclusion – Class, Athletic or Sports Participants,” states: “This insurance does not apply to ‘bodily injury’ to any person while practicing for or participating in: (1) Any sports, physical education, gymnastics, martial arts or other athletic-related class or program of instruction; or (2) Any sports, athletic contest, exhibition, recital or any similar activity.” (Doc. 30-2 at 107 (“Exercise Exclusion”).)

On December 19, 2019, Andrea Perez participated in a kickboxing class at the studio. (PSOF ¶ 4, Exh. 1 ¶ 11.) According to the complaint in the State Court Action, “the instructor told participants to jump onto a trampoline, perform an abdominal ‘crunch’ exercise, then jump off the trampoline and land on the floor. As Andrea Perez was jumping, the trampoline slipped on the wood-like flooring, flew out from underneath her, and she fell backwards onto the floor.” (PSOF ¶¶ 5–6, Exh. 1 ¶¶ 13–14.) Perez landed on and fractured both of her wrists, sustaining “severe, permanent injuries to her wrists.” (PSOF ¶ 7, Exh. 1 ¶¶ 15–16.)

On December 1, 2021, Andrea Perez and her husband, Javier Perez, filed a Complaint in Pima County Superior Court alleging the Valencias own and operate the dance and fitness studio known as DanceIt! The Perezes alleged that the Valencias and DanceIt! were negligent and, as a direct and proximate result of their negligence, Andrea “sustained serious injuries requiring medical and health care, past and future.” (PSOF ¶¶ 1, 8–9, Exh. 1 ¶¶ 17–22.)

IV. Additional Facts

The Defendants allege the following additional facts which the Court accepts as true for purposes of summary judgment.³

The landlord and property manager for the space leased by DanceIt! required liability insurance for the business to operate on the premises. (DanceIt! DSOF ¶4.)

Gabriela and Alberto Valencia obtained business insurance through Twin City’s

³These additional facts are set forth in the DanceIt! Defendants’ Separate Statement of Facts (“DanceIt! DSOF”) (Doc. 38) and the Perezes’ Controverting Statement of Facts (Doc. 40).

1 insurance agent Anthony Alvarado with Alvarado Insurance. (*Id.* ¶¶ 3, 8.) Gabriela met
 2 with Alvarado and they discussed her exercise business, the types of exercise training they
 3 do, including cardio exercise,⁴ and what liability insurance they needed for the business.
 4 (*Id.* ¶ 3–4.) Gabriela explained to Alvarado the policy was required for her business and
 5 had to protect against liability claims. (*Id.* ¶ 5.) Alvarado assured Gabriela that the policy
 6 being sold to her was the policy they needed for their business. (*Id.* ¶ 9.)

7 Prior to the incident where Andrea Perez was injured, Gabriela had never read or
 8 reviewed her policy. (*Id.* ¶ 10.) In reviewing the Policy, Gabriela learned the Policy
 9 incorrectly lists herself and her husband, Alberto, individually, as insureds, although the
 10 insurance agent understood they needed liability insurance for their business. (*Id.* ¶ 12.)
 11 In addition, the policy wrongly lists the business as a “School – Fine Art.” (*Id.* ¶ 14.)⁵

12 The Valencias relied on Alvarado and the insurance company to provide the right
 13 policy for their business as Gabriela spoke with the agent on several occasions, and he
 14 knew what business she had and what insurance she needed. (*Id.* ¶ 18.) If Gabriela had
 15 known the Policy did not protect her exercise business or the Policy excluded exercise or
 16 the use of exercise equipment, she would not have bought the Policy and continually made
 17 insurance payments. (*Id.* ¶ 19.)

18 **V. Discussion**

19 Twin City argues it is entitled to judgment because the Trampoline Exclusion, the
 20 Exercise Exclusion, and the Bodily-Injury Exclusion “clearly and unambiguously preclude

21 ⁴ Although the DanceIt! Defendants cite Gabriela’s declaration at ¶ 4 as support for their
 22 factual allegation that Gabriela told Agent Alvarado that her exercise business included
 23 “cardio exercising,” (Doc. 38 at ¶ 3), Gabriela’s declaration does not specifically reference
 24 cardio training or any other type of exercise offered at DanceIt! In her declaration, Gabriela
 25 averred only that she and Agent Alvarado “discussed my exercise business, the types of
 26 exercise training we do, and what insurance we needed for my business DanceIt! including
 liability insurance.” (Doc. 38-1 at ¶ 4.) Gabriela’s declaration does not state how she
 described her business to Alvarado.

27 ⁵ Apparently these same errors were also present in the “Business Owner’s Application.”
 28 The Application identifies the business as a “School – Fine Arts” and the insureds as
 Alberto and Gabriela Valencia. (Doc. 40-5 at 2.) No information is provided as to who
 completed the application. The document is typed and is unsigned. (Doc. 40-5.)

1 coverage for the State Court Action.” Twin City asserts that the exclusions are prominent,
 2 do not use confusing language, and “are not subject to conflicting reasonable
 3 interpretations.” (Doc. 29. at 5–6.) The DanceIt! and Perez Defendants acknowledge the
 4 existence of the Policy exclusions, but argue that the reasonable expectations doctrine
 5 precludes enforcement of the exclusions. (Doc. 37; Doc. 39.)

6 **A. Reasonable Expectations Doctrine**

7 “The reasonable expectations doctrine relieves an insured from ‘certain clauses of
 8 an agreement which he did not negotiate, probably did not read, and probably would not
 9 have understood had he read them.’” *Grabowski*, 150 P.3d at 279 (quoting *Darner Motor*
 10 *Sales, Inc. v. Universal Underwriters Ins. Co.*, 682 P.2d 388, 399 (Ariz. 1984), and citing
 11 Restatement (Second) of Contracts § 211 (1981)). “The doctrine applies only if two
 12 predicate conditions are present. First, the insured’s “expectation of coverage must be
 13 objectively reasonable. Second, the insurer must have had reason to believe that the insured
 14 would not have purchased the policy if they had known that it included the complained of
 15 provision.” *P.F. Chang’s*, CV-15-01322-PHX-SMM, 2016 WL 3055111, at *4 (cleaned
 16 up). If both of the conditions are satisfied, “Arizona courts will not enforce even
 17 unambiguous boilerplate terms in standardized insurance contracts in a limited variety of
 18 situations.” *Id.* (citing *Gordinier*, 742 P.2d at 283).

19 The Arizona Supreme Court has identified four limited situations in which the
 20 doctrine may apply:

- 21 1. Where the contract terms, although not ambiguous to the
 22 court, cannot be understood by the reasonably intelligent
 23 consumer who might check on his or her rights, the court will
 24 interpret them in light of the objective, reasonable expectations
 25 of the average insured;
- 26 2. Where the insured did not receive full and adequate notice
 27 of the term in question, and the provision is either unusual or
 28 unexpected, or one that emasculates apparent coverage;
3. Where some activity which can be reasonably attributed to
 the insurer would create an objective impression of coverage
 in the mind of a reasonable insured;

1 4. Where some activity reasonably attributable to the insurer
 2 has induced a particular insured reasonably to believe that he
 3 has coverage, although such coverage is expressly and
 unambiguously denied by the policy.

4 *Averett v. Farmers Ins. Co. of Ariz.*, 869 P.2d 505, 507 (Ariz. 1994); *see also Gordinier v.*
 5 *Aetna Cas. & Sur. Co.*, 742 P.2d 277, 283 (Ariz. 1987) (adopting Restatement § 211). “[I]f
 6 the drafting party had ‘reason to believe’ that the signing party would not have accepted a
 7 particular term, the court may strike that term from the agreement.” *Id.* (quoting *Gordinier*,
 8 742 P.2d at 283).

9 **B. Application**

10 There is a genuine issue of material fact exists as to whether the reasonable
 11 expectations doctrine should apply to prevent enforcement of the Bodily-Injury Exclusion
 12 and Exercise Exclusion. Defendants provide evidence that Gabriela met with and told the
 13 insurance agent that DanceIt! was an exercise studio and requested liability insurance.
 14 According to Gabriela’s testimony, the agent assured Gabriela that the policy he was
 15 selling her would provide the coverage she needed. These facts, if believed, could support
 16 a finding that the Valencias had an objectively reasonable expectation that Twin City would
 17 cover claims for bodily injuries sustained during exercise classes at the studio. These facts
 18 would also support a finding that the agent had reason to believe that the Valencias would
 19 not have purchased the Policy if they had known that it did not cover bodily injuries
 20 sustained during exercise classes at the studio. Thus, the Court will deny summary
 21 judgment to the extent it is requested based on the Bodily-Injury and Exercise Exclusions.

22 In contrast, the Defendants do not claim that anyone told Agent Alvarado about the
 23 use of trampolines at the studio. Thus, the Court will consider whether there is sufficient
 24 evidence to support a finding that Gabriela expected coverage for the use of a trampoline
 25 or other rebounding device at the studio or that Agent Alvarado had reason to believe the
 26 Valencias would not have purchased the Policy if they had known about the Trampoline
 27 Exclusion.

28 //

1 1. Objectively Reasonable Expectation of Coverage for a Trampoline Injury

2 Upon review of the record, the Court concludes that the DanceIt! Defendants’
 3 expectation of coverage for trampoline injuries such as the one in the State Court Action is
 4 not objectively reasonable. The Valencias did not tell the agent that DanceIt! owned,
 5 maintained, used or expected to use, trampolines of any kind. (Doc. 40-2 at 61:2–6.)
 6 Noticeably, Gabriela, in her declaration, does not claim that she told Agent Alvarado about
 7 the use of a trampoline. She also does not claim that she told Agent Alvarado about any
 8 specific type of fitness class from which he might have reasonably inferred that trampolines
 9 or rebounding devices might be used. Instead, she says she discussed “my exercise
 10 business, [and] the types of exercise training we do.” (Doc. 38-1 at ¶ 4.)⁶ This seems
 11 consistent with the lack of evidence regarding the regularity of the use of trampolines at
 12 the studio or even when the studio first began using trampolines. At her deposition,
 13 Gabriela said DanceIt! had three trampolines: one professional trampoline that she had
 14 purchased and two trampolines that Andrea Perez had purchased at the swap meet and
 15 brought into the studio. (Doc. 40-2 at 60:18–23, 61:25–62:16.) Gabriela did not remember
 16 when exactly she purchased the professional trampoline, or when Perez brought the other
 17 two trampolines into the studio. It is also not clear whether DanceIt! utilized trampolines
 18 at the time the initial insurance policy was purchased. The facts, taken in the light most
 19 favorable to Defendants, are insufficient to show that the Valencias reasonably expected
 20 the Policy would cover bodily injury sustained by DanceIt! clients who were injured while
 21 using a trampoline. Thus, the Court will grant summary judgment to Twin City based on
 22 the Policy’s Trampoline Exclusion.

23 2. Reason to Believe that the Valencias Would Not Have Purchased
 24 the Policy if They Had Known About the Trampoline Exclusion

25 Summary judgment in favor of Twin City is appropriate for the additional reason
 26 that Defendants fail to provide evidence sufficient to show Twin City had reason to believe

27 ⁶ Assuming Gabriela told Alvarado that fitness classes at DanceIt! included kickboxing,
 28 Zumba, yoga, and step aerobics, there is no evidence that trampolines are regularly used in
 any of these types of classes.

1 the Valencias would not have purchased the Policy if they had known about the Trampoline
2 Exclusion. Arizona courts consider several factors in determining whether the drafter had
3 reason to believe that the signing party would not have assented to an objectionable term:
4 (1) the parties' prior negotiations, (2) the circumstances of the transaction, (3) the fact that
5 the term is bizarre or oppressive, (4) the fact that the term eviscerates the non-standard
6 terms to which the parties explicitly agreed, and (5) whether the term eliminates the
7 dominant purpose of the transaction. *See Grabowski*, 150 P.3d at 280 (citing *Darner*, 682
8 P.2d at 397, and Restatement § 211 cmt. f). Arizona courts have also considered whether
9 the challenged policy provision can be understood if the customer does attempt to check
10 on his rights, and any other relevant facts. *See Harrington v. Pulte Home Corporation*,
11 119 P.3d 1044, 1051 (Ariz. App. 2005).

12 As to the first and second factors, there is no evidence from which the Court can
13 infer Twin City had reason to believe the Valencias would not have bought the Policy had
14 they known about the Trampoline Exclusion. The parties' prior negotiations and the
15 circumstances surrounding the transaction are limited to evidence that the Valencias sought
16 liability coverage from Agent Alvarado because their landlord required them to and
17 because they were concerned about claims from the public and customers. The Valencias
18 made Agent Alvarado aware that DanceIt! was a fitness studio. However, in interactions
19 with Agent Alvarado, Gabriela did not mention the use of trampolines and she did not
20 reference any specific cardio exercise which might have alerted Alvarez that trampolines
21 could be used in fitness classes at the studio.

22 For the same reasons, the Court does not find the third, fourth, and fifth factors
23 favor the Defendants. As Defendants state, the "primary and basic purpose" of the
24 insurance policy was to provide financial protection to a fitness studio in "one of the
25 available fitness classes." (Doc. 39 at 6.) And while Twin City should have known that
26 the application of the Bodily-Injury and Exercise Exclusions would be contrary to that
27 expectation, there is no evidence that Twin City would have been similarly aware that the
28 Trampoline Exclusion would be contrary to the Valencias's expectations. Again, there is

1 no evidence that Twin City knew that DanceIt! offered classes involving trampolines or
2 offered any specific type of exercise which would have alerted Twin City that trampolines
3 could be used in its fitness classes. There is no evidence that DanceIt! was utilizing
4 trampolines at the time the Policy was purchased. Consequently, it cannot be said that the
5 Trampoline Exclusion was “bizarre” or “oppressive,” or that it would wholly and
6 completely negate the reason the policy was purchased. And, the Trampoline Exclusion
7 does not eviscerate any non-standard term to which the parties explicitly agreed.

8 Finally, the Defendants do not dispute that the Policy exclusions could be
9 understood if the Valencias had attempted to check on their rights, although Defendants
10 argue “the exclusions were buried near the end of the document and there was nothing in
11 the policy itself that drew attention to the athletic activity and trampoline exclusion from
12 the dozens of other endorsements and exclusions added to the policy by Twin City.” (*Id.*
13 at 7.) Arizona courts have considered whether a challenged policy provision can be
14 understood if the customer does attempt to check on his rights, and any other relevant facts,
15 *see Harrington*, 119 P.3d at 1051. Here the Trampoline Exclusion was readily
16 understandable, and Gabriela admits in her affidavit that the Valencias never checked on
17 their rights.

18 In sum, Defendants fail to point to evidence sufficient to show that Twin City had
19 any reason to believe that DanceIt! had trampolines, needed coverage for trampolines, or
20 that the Valencias would not have purchased the Policy if they had known about the
21 Trampoline Exclusion. Indeed, neither the DanceIt! nor the Perez Defendants explain how
22 the agent would have had reason to know the Valencias would not have purchased the
23 Policy if they had known about the Trampoline Exclusion. Therefore, for this additional
24 reason, the Court finds that Plaintiff is entitled to summary judgment; Defendants have not
25 carried their burden of showing the reasonable expectations doctrine applies. *See P.F.*
26 *Chang’s*, CV-15-01322-PHX-SMM, 2016 WL 3055111, at *4.

27 **C. DanceIt! Defendants’ Additional Arguments**

28 The DanceIt! Defendants argue that Twin City’s filing of its motion for summary

1 judgment is “premature, at best, and is indicative of bad faith.” (Doc. 37 at 3.) Twin City’s
 2 motion is not “premature.” Rule 56(b) allows a party to file a motion for summary
 3 judgment “at any time until 30 days after the close of all discovery.” Rule 56, Fed. R. Civ.
 4 P. Moreover, in cases like the instant one, where the nonmoving party will bear the burden
 5 of proof at trial on a dispositive issue, a summary judgment motion may properly be made
 6 in reliance solely on the “pleadings, depositions, answers to interrogatories, and admissions
 7 on file.” *Celotex Corp.*, 477 U.S. at 324. Notably, although DanceIt! criticizes Twin City
 8 for filing its motion for summary judgment before the completion of discovery, DanceIt!
 9 does not ask for additional time to take discovery to enable it to present facts essential to
 10 justify its opposition to the motion, as Rule 56 allows it to do. *See* Fed. R. Civ. P. 56(d).

11 For the same reasons, the Court rejects DanceIt!’s argument that Twin City is not
 12 entitled to summary judgment because its Motion “completely ignores the reasonable
 13 expectations doctrine” set forth in their counterclaim asserted in their Answer.⁷ (Doc. 24.)
 14 It is the Defendants’ burden to assert and prove that the reasonable expectations doctrine
 15 applies. *See P.F. Chang’s*, 2016 WL 3055111, at *4 (“The insured bears the burden of
 16 proving the applicability of the reasonable expectations doctrine at trial.”).

17 Lastly, the DanceIt! Defendants argue their counterclaims for misrepresentation,
 18 breach of contract, and bad faith are not addressed by Twin City, “[t]here is no evidence
 19 that Twin City has conducted a coverage investigation,” and Twin City has “ignored the
 20 Counterclaim[s] and proceeded on moving for summary judgment.” (Doc. 37 at 6.) This,
 21 according to the DanceIt! Defendants, shows that “Twin City knows at this point it is acting
 22 in bad faith by refusing to acknowledge coverage.” (*Id.*) Defendants’ counterclaims are
 23 not addressed by any party in the briefing on the pending motion for summary judgment.
 24 It appears that the counterclaims may be resolved by the Court’s ruling on the coverage
 25 issues presented in this motion.

26 //

27
 28 ⁷DanceIt! asserts misrepresentation, breach of contract, and bad faith counterclaims. (Doc. 37 at 1.)

